

NFO Kickoff Event

NATIONAL FOIA OFFICE
OFFICE OF GENERAL COUNSEL

MAY 21, 2019



National FOIA Office
EPA Office of General Counsel

Overview

Welcome!

FOIA Is an Agency Priority

FOIA: The Prologue

FOIA Procedures

FOIA Exemptions

FOIA Review Principles

FOIA Is An Agency Priority

EPA's FY 2018-2022 Strategic Plan SM-16:

- “By September 30, 2022, eliminate the backlog and meet statutory deadlines for responding to Freedom of Information Act (FOIA) requests.”

Administrator Wheeler's “Fishbowl Memo”:

- Reaffirmed EPA's commitment to meeting its FOIA obligations, as **FOIA “encourages accountability through transparency.”**

Congressional focus on EPA FOIA:

- Several Congressional information requests and House Oversight Committee had some questions for NFO Acting Director Tim Epp in March.



FOIA: The Prologue

July 5, 1966: President Lyndon Johnson signed the Freedom of Information Act into law.

FOIA provides any person with a right of access to federal agency records unless those records are protected from disclosure under the law.

FOIA is often described as a means for the public to know “what their Government is up to.”

Who May Make a FOIA Request?

“Any person” – regardless of citizenship

- Includes individuals, corporations, associations, state and local governments, foreign government, etc.

Exceptions:

- Fugitives from justice, if the requested records relate to the requester’s fugitive status; or
- Foreign governments requesting information from intelligence agencies.

What Records Are Subject to FOIA?

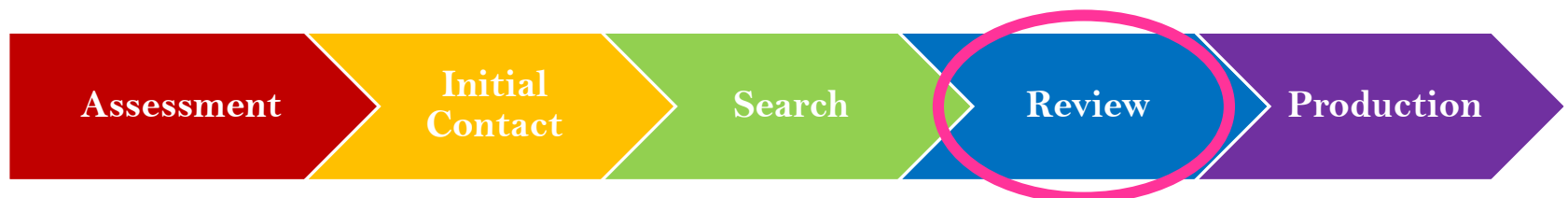
Agency Records

- Two-part test:
 - (1) Created or obtained by agency;
 - AND
 - (2) Under agency control when received the request.
- The definition of a FOIA record is broader than the definition of a record under the Federal Records Act!

Processing a FOIA Request

EPA has 20 working days to respond to a FOIA request:

- ✓ Assess the request for scope and estimated fees, and contact requester for any clarification;
- ✓ Conduct an adequate search;
- ✓ Review potentially responsive records for application of any exemptions (withholdings); and
- ✓ Produce all non-exempt documents or portions of documents.



A. Structure of the Internet Research Agency

(b) (7)(A), (b) (7)(E)

(b) (7)(A), (b) (7)(E)

(b) (7)(A), (b) (7)(E)

The organization quickly grew. (b) (7)(A), (b) (7)(E)

(b) (7)(A), (b) (7)(E)

The growth of the organization also led to a more detailed organizational structure.

(b) (7)(A), (b) (7)(E)

U.S. Department of Justice

Attorney Work Product // May Contain Material Protected Under Fed. R. Crim. P. 6(e)

The presidential campaign of Donald J. Trump ("Trump Campaign" or "Campaign") showed interest in WikiLeaks's releases of documents and welcomed their potential to damage candidate Clinton. Beginning in June 2016, (b) (6), (b) (7)(A), (b) (7)(B), (b) (7)(C) forecast to senior Campaign officials that WikiLeaks would release information damaging to candidate Clinton. WikiLeaks's first release came in July 2016. Around the same time, candidate Trump announced that he hoped Russia would recover emails described as missing from a private server used by Clinton when she was Secretary of State (he later said that he was speaking sarcastically). (b) (6), (b) (7)(A), (b) (7)(B), (b) (7)(C)

WikiLeaks began releasing Podesta's stolen emails on October 7, 2016, less than one hour after a U.S. media outlet released video considered damaging to candidate Trump. Section III of this Report details the Office's investigation into the Russian hacking operations, as well as other efforts by Trump Campaign supporters to obtain Clinton-related emails.

FOIA Exemptions:

5 U.S.C. § 552(b)

(1) Classified Information

(2) Internal Personnel Rules & Practices

(3) Exempted by Other Statute

(4) Confidential Business Information

(5) Civil Discovery Privileges

(6) Personal Privacy Information

(7) Law Enforcement

(8) Matters Related to Regulating or Supervising Financial Institutions

(9) Wells

Exemption 5: The Discovery Privileges

Protects “Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”

Exemption 5: Analysis

Step 1: Is the record an intra-agency or inter-agency communication?

Step 2: Does a Discovery Privilege apply?

- Deliberative Process Privilege
- Attorney-Client Privilege
- Work Product Privilege

Exemption 5: *Step 1*

Step 1. Threshold Question: Is the record an intra-agency or inter-agency communication?

- Intra-Agency (EPA ↔ EPA)
- Inter-Agency (EPA ↔ Dept. of Energy)
- “Contractor Corollary” (EPA ↔ Contractor)
- “Common Interest Doctrine” (EPA ↔ Party w/ Common Interest)
- If yes, move to Step 2
- If not intra- or inter-agency, you cannot assert Exemption 5

Exemption 5: *Step 2*

Step 2. Does a Discovery Privilege Apply?

- Deliberative Process Privilege
- Attorney-Client Privilege
- Work Product Privilege

Exemption 5: *Step 2*

Deliberative Process Privilege

(A) Must Be Pre-Decisional

- What is the decision?
- Look Out For: “I believe”; “In my opinion”

(B) Must Be Deliberative

- “The give-and-take of consultative process”

Potentially Deliberative	Not Deliberative
<ul style="list-style-type: none">• Potential courses of action discussing• Considering responses to public inquiry• Draft rule-making document• Options memorandum	<ul style="list-style-type: none">• Purely factual information• Final decision• Publicly available

Exemption 5: *Step 2*

Deliberative Process Privilege

(C) Harms:

- encourage open, frank discussions
- protect against premature disclosure of proposed policies before adoption, and
- protect against public confusion that might result from disclosure.

Exemption 5:

Attorney-Client Privilege

Step 1: Intra-agency or inter-agency communication?

Step 2: Does a Discovery Privilege apply?

- Deliberative Process Privilege
- [Attorney-Client Privilege](#)
- Attorney Work-Product Privilege

Exemption 5: *Step 2*

Attorney-Client Privilege

Concerns confidential communications between an attorney and the attorney's client relating to a legal matter for which the client has sought professional advice

(A) Confidential

- Communication is confidential (not necessarily the subject matter)

(B) Client

- May be those with decision-making authority
- May be those who have information that may be necessary to inform the attorney's recommendation

Look Out For This: “OGC” “DOJ” “Attorney-Advisor”

Exemption 5: *Step 2*

Attorney Work-Product Privilege

The work
product privilege
protects
material:

- (A) prepared by, or at the direction of, an attorney
- (B) in reasonable anticipation of litigation.
 - Does not apply until articulable claim likely to lead to litigation has arisen

May apply to
records relating
to:

- Civil and criminal litigation
- Administrative proceedings
- Efforts to settle claims

Look Out For This: “OGC” “DOJ” “Attorney-Advisor”

Exemption 5: *Reminder*

Step 1: Intra-agency or inter-agency communication?

Step 2: Does a Discovery Privilege apply?

- Deliberative Process Privilege
 - “In my opinion”
 - (Pre-Decisional, Deliberative, Purpose)
- Attorney-Client Privilege
 - (Confidential, Attorney-Client)
- Attorney Work-Product Privilege
 - (Attorney, Litigation)

Exemption 6: *Personal Privacy*



- Step 1 -- Threshold
- Step 2 -- Privacy interest
- Step 3 -- Public Interest
- Step 4 -- Balancing

Exemption 6: *Step 1* *Threshold*

Exemption 6 protects personal information

“Personnel and medical files and similar files” when disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.”

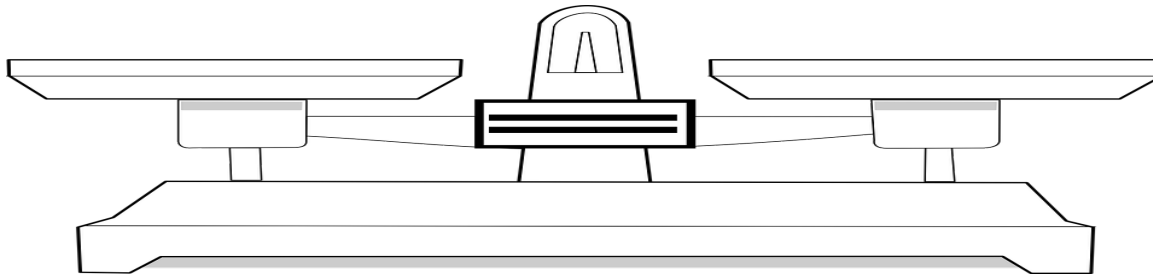
Exemption 6: *Step 2*

Privacy Interest

Privacy broadly encompasses an individual's control of information concerning his or her person

Personally Identifiable Information (PII) must be protected

- Name+, address, phone number, SSN, DOB, criminal history, medical history



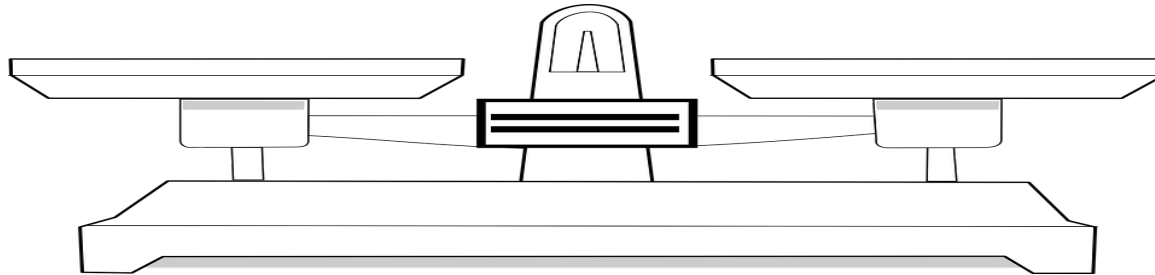
Exemption 6: *Step 3*

Public Interest

Does the information shed light on an agency's performance of its statutory duties?

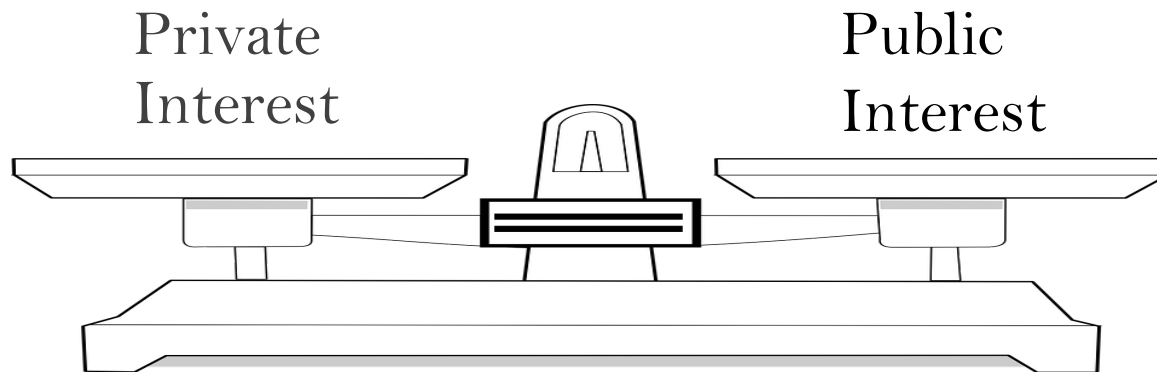
The burden is on the requester to show a public interest.

The requester's private need for the information is irrelevant.



Exemption 6: Step 4

Balancing Test



Exemption 6:

FAQ re: Privacy Interests

Do civilian federal employees have privacy rights?

- Yes, but some information does not get protection, such as: Name, position titles, occupational series, grade, duty station, annual salary, performance awards

Do public figures have privacy rights?

- Yes, but they may have diminished privacy rights.

Do corporations have privacy rights?

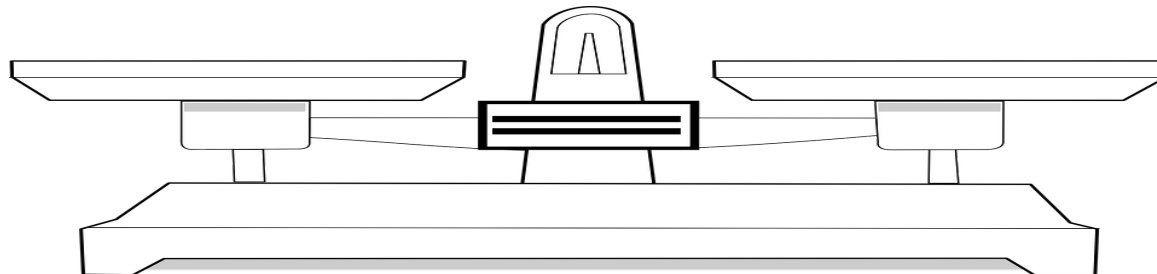
- Usually no.

Does an individual's privacy interest fade over time?

- No, but there is one exception.

Exemption 6: *Other Examples*

- Email from a coworker “Here’s a photo of my cat, isn’t he cute?”
- Email from a coworker’s account suzyq@gmail.com
- Email from your EPA supervisor with a cell phone number in the email body



Exemption 7

Law Enforcement Exemptions

Protects from disclosure “**records or information compiled for law enforcement purposes**” where such disclosure meets the standard set forth in one of six subsections under Exemption 7.

Exemption 7: *Threshold Issue*

“Records or information compiled for law enforcement purposes”

- Focus on why the information was collected or compiled

Does not have to be originally compiled for law enforcement purposes

- But ... should be compiled for law enforcement purposes at the time of the FOIA request

Exemption 7: *Examples of Law Enforcement Records*

Information collected by EPA Special Agents as part of a criminal investigation

Documents created as part of a civil or criminal enforcement proceeding

Information collected as part of a background security investigation

Memoranda and notes created as part of an employment discrimination investigation

Exemption 7: *Subsections*

- a) “Could **reasonably interfere** with **enforcement proceedings**”
- b) “Would deprive a person of a **right to a fair trial** or an impartial adjudication”
- c) “Could reasonably be expected to constitute an unwarranted invasion of **personal privacy**”
- d) “Could reasonably be expected to disclose the **identify of a confidential source** ... information furnished by a confidential source”
- e) Would disclose **techniques, procedures, or guidelines** for law enforcement investigations or prosecutions, including where such disclosure would **risk circumventing the law**
- f) “Could reasonably be expected to **endanger the life or physical safety** of any individual”

Exemption 7(A): *Pending Investigations*

Two elements:

- Whether a law enforcement proceeding is pending or prospective.
- AND
- Whether release of information could reasonably be expected to cause some articulable harm.

Exemption 7(C): *Personal Privacy*

Would disclosure of the information reasonably constitute an unwarranted invasion of personal privacy?

Conduct similar analysis for Exemption 6, but lower standard to apply this exemption:

- “Would constitute” vs. “Could reasonably be expected to constitute”
- “Clearly unwarranted” vs. “Unwarranted”

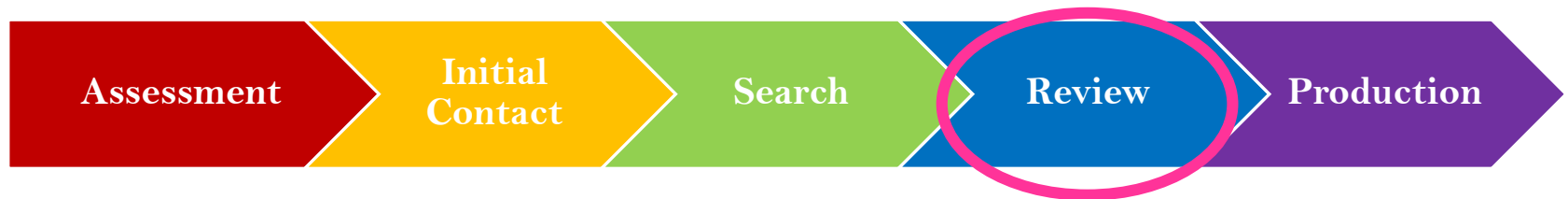
Exemption 7(E): *Guidelines, Procedures & Techniques*

Concerns guidelines, procedures, or techniques for law enforcement or prosecutions

AND

Could be used by an outside party to violate the law or otherwise avoid investigation or prosecution

FOIA Review Principles



Segregability

Foreseeability of Harm

Document Equities

Consistency

FOIA Review Principles:

Segregability

Agencies must identify and segregate exempt information and apply the appropriate exemption to indicate the basis for each redaction.

In Practice—Details, details, details!

- FOIA obligates us to conduct a line-by-line review of each responsive document
- “Painstaking detail”

Pointer—Always double check your disposition determination when you want to select ‘Withhold in Full’

FOIA Review Principles:

Foreseeability of Harm

5 U.S.C. § 552(a)(8)(A) codifies the foreseeable harm standard:

- “An agency shall withhold information under [FOIA] only if (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law.”

Application in practice: To support a withholding, EPA must be able to show it is reasonably foreseeable that a harm an exemption is designed to protect will happen if the information is disclosed.

Analysis applies to EACH withholding!

FOIA Review Principles:

Document Equities

Equity in a document = contribution to the content of the document, usually substantive

When separate EPA program offices have equities in a document:

- Internal equity review: An opportunity for program office(s) to weigh in on the disclosure.

When other federal agencies have equities in a document:

- **Referral** – Sending records to originating agency for direct response to the requester
- **Consultation** – Obtaining the opinion of another agency before responding to the requester

FOIA Review Principles:

Consistency

All or nothing rule (mostly): Generally, information withheld should be withheld throughout, and information disclosed should be disclosed throughout.

- Context and varying threshold issues can create exceptions to this general rule

Disciplined application of the exemption analyses make defensible determinations!!



Let's Get Started!